

## **CORNERING THE KREMLIN: DEFENDING YUKOS AND TNK-BP FROM STRATEGIC EXPROPRIATION BY THE RUSSIAN STATE**

Brenden Marino Carbonell\*

### **I. INTRODUCTION**

On October 25, 2003, heavily armed police surrounded the private jet of Mikhail Khodorkovsky, the billionaire head of Russia's then leading oil producer Yukos, and arrested him.<sup>1</sup> The following months witnessed the government-orchestrated destruction of Yukos through sweeping arrests of the oil giant's top managers and a barrage of massive tax assessments and penalties.<sup>2</sup> The final blow came in December 2004 with the auction of Yuganskneftgaz,<sup>3</sup> Yukos' most prized production entity, which alone accounted for 60 percent of the oil company's output.<sup>4</sup> The \$9.3 billion winning bid was submitted by a previously unknown entity named

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\* Brenden Marino Carbonell is a third-year law student at the University of Pennsylvania Law School. Brenden graduated magna cum laude from Yale with a Bachelor's Degree in Ethics, Politics, and Economics, earning Distinction in his major and induction into Phi Beta Kappa. His studies inspired him to investigate the social and legal ramifications of political and economic transitions, most notably those of the countries of the former Soviet Bloc. With a burgeoning interest in Russia, Brenden decided to master the Russian language, and went on to win Yale's First Year Russian Student Award. In addition, Brenden has a passion for Cuba, and his senior thesis on the Cuban military won First Prize in the Jorge Pérez López Competition of the Association for the Study of the Cuban Economy (ASCE). He presented his thesis at the ASCE conference in Miami in 2007, and at the international conference "A Changing Cuba in a Changing World" held in New York City in the spring of 2008. Brenden is a joint-degree candidate, pursuing both his Juris Doctor at Penn Law and a Master's in International Studies with a concentration in Russian at Wharton's Lauder Institute.

1. MARSHALL I. GOLDMAN, PETROSTATE: PUTIN, POWER, AND THE NEW RUSSIA 116 (2008).

2. *See Id.* at 116-20 (noting the "more than two dozen people associated with Yukos who have either been jailed or have fled into exile.").

3. "Neft" and "gaz" are the Russian words for "petroleum" and "natural gas" respectively.

4. *See Id.* at 120 (stating that "[s]everal outside appraisers insisted that the price was less than half of what such an auction should have yielded.").

Baikalfinansgroup,<sup>5</sup> which days later merged with the state-controlled oil company Rosneft.<sup>6</sup> In little over a year, as if suddenly struck by the thunderbolt of an enraged god, Yukos' market capitalization, which in 2003 had surpassed \$40 billion, had plummeted 95 percent to roughly \$2 billion.<sup>7</sup> When the dust finally settled, the Russian government had effectively renationalized the Yukos Oil Company.<sup>8</sup>

The Russian state's intense effort to dismantle Yukos and, ultimately, re-acquire the private oil company's assets, ushered in a new era. The laissez-faire government policy that fuelled the free-wheeling "market euphoria"<sup>9</sup> characteristic of Russia's energy sector in the 1990s<sup>10</sup> had come to an abrupt end. A new, more sobering state project had succeeded: the reassertion of state control over Russia's vast energy resources. Russia's former president and current Prime Minister, Vladimir Putin, spearheaded the policy shift, asserting that Russia could regain its superpower status by rerouting oil and natural gas profits from the private sector to the state. Russia could then use the energy revenues to further national interests.<sup>11</sup> Putin emphasizes the need to "rationalize" the natural gas and petroleum industries in order to promote the search for new crude deposits and technological innovation and use Russia's energy wealth to further the Russian state's grand strategy.<sup>12</sup> The notion of state control occupies an important space in the new energy policy, perhaps justifiably so given the Russian government's meager tax revenues and the damage done to the state bureaucracy by the precipitous privatization campaign of the early 1990s.<sup>13</sup>

The new policy's objective of achieving state dominance in Russia's energy sector poses a serious threat to private petroleum and natural gas companies, especially companies with high foreign equity participation or

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5. Several names for this entity exist in the literature, including "Baikal Finance Group." I am using Matteo M. Winkler's translation, *infra* note 6.

6. Matteo M. Winkler, *Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court*, 27 U. PA. J. INT'L ECON. L. 115, 120 n.23 (2006).

7. Plaintiff's Verified Emergency Motion for Temporary Restraining Order and Preliminary Injunction ¶ 17 at 7, *In re Yukos Oil Co.*, Nos. 04-47742-H3-11, 04-03952 (Bankr. S.D. Tex. 2004).

8. This is, of course, a controversial claim, which will be discussed later in more detail.

9. Harley Balzer, *The Putin Thesis and Russian Energy Policy*, 21 POST-SOVIET AFF. 210, 218 (2005) (quoting V. V. Putin, *Mineral'no-syr'evyye resursy v strategii razvitiya Rossiyskoy ekonomiki* [Mineral natural resources in the strategy for development of the Russian economy], 144 ZAPISKI GORNOGO INSTITUTA, 1999, at 7).

10. See GOLDMAN, *supra* note 1, at 57-65 (describing the chaos of the privatization of state-owned enterprises in the energy sector, including the notoriously self-dealing "Loans for Shares" program).

11. *Id.* at 97.

12. Balzer, *supra* note 9, at 218.

13. GOLDMAN, *supra* note 1, at 57.

those managed by foreign executives.<sup>14</sup> The destruction of Yukos, though perhaps motivated by many distinct interests, has established an archetype of government acquisition: investigations by the tax authorities followed by the lodging of massive back-tax claims and penalties, which Russian courts uphold. While some analysts contend that the expropriation of Yukos will remain an isolated incident,<sup>15</sup> such a conclusion does not comport with the stated ideology of the Putin administration, which stresses state ownership and control of natural resources.<sup>16</sup> The literature treating the relationship between the Russian state and the private energy sector indicates that government aggression toward private firms continues, and the state may, indeed, launch another major expropriation if such a move were to dovetail with Russian grand strategy. Private firms, and particularly foreign firms, operating in Russia's petroleum and natural gas sector must understand that the risk of expropriation, among other forms of state hostility, is real, and plan potential litigation strategy accordingly.

Moreover, Russian courts have increasingly demonstrated their dependence on the executive branch of the Russian government.<sup>17</sup> Thus, one of the most urgent legal needs for private energy companies is to escape the Russian court system and gain access to a foreign national court sitting in either the United States or Western Europe, or an international arbitral tribunal. The threshold issue for determining access to any of these fora is jurisdiction, for without this "power to declare the law . . . the court cannot proceed at all in any cause."<sup>18</sup> Taking up the jurisdictional gauntlet remains a thorny challenge, regardless of the greater litigation strategy, and restrains the range of legal options available to a private oil company seeking to litigate outside of Russia. Courts in the United States and Western Europe routinely grapple with questions regarding sovereign immunity, minimum contacts, a company's center of main interests, and others. After careful examination of two alternatives, this comment concludes that bringing suit in the United States for expropriation of property under the U.S. Foreign Sovereign Immunities Act (FSIA)<sup>19</sup> represents the better litigation strategy for a private energy company operating in Russia, which has suffered an illegal nationalization of

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14. See Balzer, *supra* note 9, at 221 ("All [oil companies] are subject to the threat of sharing Yukos' fate . . .").

15. See Philip Hanson, *Observations on the Costs of the Yukos Affair to Russia*, 46 EURASIAN GEOGRAPHY & ECON. 481, 490 (2005) (suggesting that the Kremlin will not repeat a Yukos-style expropriation).

16. See generally Balzer, *supra* note 9 (analyzing the ideas behind Putin's doctoral dissertation, which argues for state control over the use of Russia's energy resources).

17. See Hanson, *supra* note 15, at 484 ("[T]he Russian state can use a procuracy and courts that will do the state's will, regardless of the letter and spirit of the law.").

18. *In re Yukos Oil Co.*, 321 B.R. 396, 405 (Bankr. S.D. Tex. 2005).

19. Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (2000).

property by the Russian state.

This comment is composed of two major sections. The first section provides background on the policy shift adopted by the Putin administration, defining government control of Russia's energy resources as a paramount objective. Furthermore, the first section examines some of the tactics embraced by the Putin administration to effectuate the policy of state control. Finally, this section introduces Yukos—describing its fate and the reasons behind the intensity of its dismemberment—and TNK-BP, a giant private oil company half-owned by BP and half-owned by the Alpha-Access-Renova (AAR) group, a consortium headed by four Russian oligarchs.

The second section will analyze two methods for legally defending TNK-BP and other private oil companies from expropriation of their assets by the Russian government. The comment will examine the feasibility of bringing a suit in the United States under the Foreign Sovereign Immunities Act (FSIA), including potential challenges to jurisdiction and the cause of action. Moreover, the comment will review another litigation alternative: initiating arbitration according to the rules of the International Center for the Settlement of Investment Disputes Convention of 1965 (hereinafter ICSID Convention). The comment will ultimately conclude that a suit under the FSIA represents the more attractive litigation strategy for a company such as TNK-BP.

Taking on the Russian state is a formidable task. Even if one manages to establish extraterritorial jurisdiction, one must still defend against the Russian state and other defendants' motions to dismiss for various causes, including *forum non conveniens* and the U.S. Act of State Doctrine. Even surmounting these defendant-generated challenges does not guarantee against the court *sua sponte* dismissing a case, not on jurisdictional grounds, but rather based on a weighing of the totality of circumstances.<sup>20</sup> The literature treating Russian energy sector politics and international jurisdiction is vast. This comment focuses on several key articles and cases that offer guidance to the problem of litigating against the Russian state with regard to energy sector expropriation. This comment does not purport to be a comprehensive proposal for saving TNK-BP or other firms from renationalization, but rather seeks to investigate the challenge posed by Russian policy and explore ways for a private energy company to legally meet that challenge.

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20. See *In re Yukos*, 321 B.R. at 411 (concluding the Yukos' Chapter 11 case should be dismissed based only on the totality of the circumstances).

## II. BACKGROUND OF THE SHIFT TOWARD STATE CONTROL OF THE ENERGY SECTOR

The Putin administration's decision to reign in the energy sector and assert government control over it came after a decade of free market experimentation. After the collapse of the Soviet Union, the Yeltsin administration led a massive effort to privatize state-owned enterprises and foster the transition toward Western-style, free-market capitalism. In *Petrostate*, Marshall I. Goldman, gives a vivid account of the chaos spawned by precipitous privatization, particularly in the petroleum and natural gas industries.<sup>21</sup> What were in Soviet times monolithic government ministries, were cut up and packaged into smaller assets, most of which ended up in private hands.<sup>22</sup> Soon, "oligarchs" like Khodorkovsky came to control vast energy resources and amass large fortunes.<sup>23</sup>

The problem for Putin and his administration had less to do with the sheer wealth of the oligarchs than with the economic and political power that they grew accustomed to wielding. Vladislav Surkov, deputy head of the Presidential Administration under Putin, captured the mood of the Kremlin vis-à-vis the powerful private elites in a May 17, 2005 discussion with business representatives: "[W]e will not allow a small group of companies to be the power in the country, where they permeate the state apparatus."<sup>24</sup> Surkov went on to criticize what he saw as an "offshore aristocracy" composed of oligarchs and other wealthy Russian elites whose loyalty to Russian national interests had become ambiguous.<sup>25</sup> Not only did rich Russians cultivate greater ties with the West, including the transfer of large funds to Western bank accounts,<sup>26</sup> but elites in the energy sector had begun to assume traditional state roles, such as negotiating contracts with foreign sovereigns. For example, prior to his arrest, Khodorkovsky favored the opening of the Chinese market to Russian petroleum and had agreed to build an oil pipeline into China.<sup>27</sup> The Russian government not only preferred the construction of a pipeline link to Japan, but also "sought to limit China's growing power."<sup>28</sup> Khodorkovsky's unilateral negotiations

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21. See GOLDMAN, *supra* note 1, at 57-65 (describing the chaos of the privatization of state-owned enterprises in the energy sector, including the notoriously self-dealing "Loans for Shares" program).

22. *Id.* at 58-62. The notable exception to this was Gazprom (formerly the Ministry of the Natural Gas Industry), which remained largely intact after the wave of privatization.

23. *Id.* at 64, 106.

24. Hanson, *supra* note 15, at 483 (quoting Surkov).

25. *Id.* at 484.

26. *Id.* at 486.

27. Balzer, *supra* note 9, at 220.

28. *Id.*

with the Chinese government clashed with the Russian state's grand strategy for the country. This type of action with respect to China illustrates the kind of prerogatives that the Putin administration believed should rightly belong to the state alone.

For Putin, Khodorkovsky's *sua sponte* foreign policy maneuverings stemmed from the myopic policies of the 1990s. In an effort to modernize Russia, the Yeltsin administration sacrificed the state's power and spoiled a generation of wealthy elites, who now stood convinced that they spoke for Russia. According to Putin, "[u]nfortunately, when market reforms began the state lost control of the resource sector. However, now the market euphoria of the first years of economic reform is gradually giving way to a more measured approach . . . ."<sup>29</sup> This excerpt demonstrates Putin's apparent disdain for the Yeltsin liberalizations, characterizing the market they engendered as a manic episode. Putin's approach, in contrast, promises to be "measured." In other words, Putin promises calculated moves, which will correct a mistake as catastrophic as "los[ing] control of the resource sector," and the attendant loss of sovereignty. With the introduction of Putin's new policy, the Russian government, not private individuals, will make all the big decisions regarding the production and distribution—including export—of Russian petroleum and natural gas.

#### *Putin's New Energy Policy*

In 1997, Vladimir Putin earned a "*Kandidat* of Sciences degree in economics," for which he defended a thesis regarding the Russian state's role in the energy sector.<sup>30</sup> Harley Balzer examines the substance of Putin's ideas in his article *The Putin Thesis and Russian Energy Policy*.<sup>31</sup> According to Balzer, Putin and his associates "have a clear view of what they are about"<sup>32</sup>:

If used effectively, mineral resources can provide the basis for Russia's entry into the world economy;<sup>33</sup>

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[T]he existing socio-economic conditions and also the strategy for Russia's exit from the deep crisis and restoration of its former power on a qualitatively new basis demonstrate that the condition of the natural resource complex remains the most important factor in the state's development in the near term.<sup>34</sup>

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29. *Id.* at 218 (quoting Putin, *supra* note 9, at 7).

30. *Id.* at 211.

31. Balzer, *supra* note 9.

32. *Id.* at 222.

33. *Id.* at 217.

34. *Id.* at 219 (quoting Putin, *supra* note 9, at 9).

These excerpts reveal that, for Putin, energy resources represent an opportunity for Russia to recover economically and re-emerge on the geopolitical stage as a superpower. The oil and natural gas should further the revitalization of the entire country. Goldman corroborates this interpretation: “Instead of allowing the country’s oligarch-controlled corporations to focus exclusively on making a profit, Putin proposed that they should be used instead to advance the country’s national interests.”<sup>35</sup> Goldman emphasizes that Putin favors the notion of “national champions,” leading companies that would not only produce vast streams of wealth for Russia, but would also assume a social mission, such as providing low cost fuel at home through subsidies, while charging prevailing market prices abroad.<sup>36</sup> The “national champions” would be “vertically integrated financial-industrial groups to compete with Western multinationals.”<sup>37</sup> Despite the nationalism inherent in Putin’s ideas, the state would encourage foreign investment, “but those investors must understand that Russia would retain operating control, investment or no investment.”<sup>38</sup> In short, under Putin’s watch, the Russian energy sector would become national, and would serve the interests of Russia, much like the military, the foreign service, and other state institutions.

### *Ideological Justification*

The new policy has two principal justifications: ideology and practicality. The main ideological driver is that Russia must become a superpower again and play a role in world affairs. This is the grand strategy. As the evidence cited above confirms, Putin sees energy as the route toward renewed superpower status. Moreover, as Russia rebuilds its power, it must take care not to empower rival states such as China. Indeed, no other emerging nation should ride Russia’s coattails toward its own renaissance. As demonstrated above, Khodorkovsky’s unilateral “treaty” with China for the building of an oil pipeline would have represented a major setback to the Putin administration’s grand strategy, and therefore could not stand.

Moreover, the third component of the ideology is that Russia should care for its people and fully recover from the Soviet Union’s collapse. The Yeltsin years led to power and wealth for the few lucky or ruthless enough to snatch it. Yet, the vast majority of Russians ended up with nothing to show for the fast-tracked privatization plan.<sup>39</sup> The new energy sector

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35. GOLDMAN, *supra* note 1, at 97.

36. *Id.* at 98-99.

37. Balzer, *supra* note 9, at 214.

38. GOLDMAN, *supra* note 1, at 98.

39. *See id.* at 58 (describing how ordinary Russians sold their privatization vouchers

policy would serve to remedy these social ills: “[The raw materials sector] represents the basis for modernizing Russia’s military-industrial complex. It promotes social stability and can raise the well-being of the population.”<sup>40</sup> The revitalized military would provide thousands of new jobs; an increase in manufacturing would have the same result. The wealth generated by fossil fuel exports would swell the state’s stabilization fund, which could curb inflation and ultimately supply infrastructure, healthcare, and education investment. Thus, natural resources could raise standards for ordinary Russians.

The new energy ideology rests on a fundamental understanding of the relationship between the state and the land. As Sergey Ivanov, defense minister under Putin, states: “[M]inerals and resources are state property, not private. Therefore the state has the full right to control this process and manage it in the interest of the entire country’s development.”<sup>41</sup> Putin holds a similar view: “Regardless of who [sic] the legal owner of the country’s natural resources [sic] and in particular the mineral resources, the state has the right to regulate the process of their development and use.”<sup>42</sup> The extent of this regulation remains ambiguous; “use” is open to wide interpretation, and can reasonably encompass sales, such as exports to a rival state. The important point is that the concept of inherent state ownership of raw materials undergirds the ideological driver for asserting government control over the energy sector.

### *Practical Justification*

The practical justification for the new policy dovetails with the ideological justification—lending further support for the notion that the state should reassert control over the petroleum and natural gas industries. The practical argument consists of two parts: the failure of market forces and meager state revenues. As to the first part, Putin has this to say: “The financial condition of enterprises in the extractive and processing industries today, using uncompetitive technologies in their production processes, lacking budgets for geologic exploration work—all this means state agencies must support organizing financial-industrial groups . . . .”<sup>43</sup> Market forces have apparently failed to provide incentives for private investment in new technology and exploration of new oil and gas fields, with the consequence that the Russian energy sector will not be self-sustaining once current field exploitation exhausts known reserves.

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“and [their] entitlement to a share of stock for a bottle of vodka or a few rubles”).

40. Balzer, *supra* note 9, at 217.

41. *Id.* at 213.

42. GOLDMAN, *supra* note 1, at 97-98.

43. Balzer, *supra* note 9, at 217 (quoting Putin, *supra* note 9, at 6).



Defense Minister Ivanov shares this view: “[I]n recent years we have become convinced that private companies will not invest in exploration work.”<sup>44</sup> Furthermore, Ivanov bears his frustration at the fact that the Soviet Union conducted all the exploration, from which wealthy elites now benefit.<sup>45</sup>

Market forces also fail to take into account grand strategic considerations. According to Balzer: “Mr. Putin asserts that rational resource use, environmental protection, and ensuring long-term energy security are beyond the capacity of market mechanisms.”<sup>46</sup> For Putin, “rational resource use” means furthering the overall interests of the state vis-à-vis foreign powers. Khodorkovsky’s abortive deal with China did not factor in Russian statecraft.<sup>47</sup> Additionally, the failure of most Russians to pay taxes illustrates the disconnect between Russian business goals and government plans.<sup>48</sup>

#### *Methods of Reigning in the Energy Sector*

In order to effectuate its goal of asserting control over the energy sector in line with the Putin administration’s new policy ideology, the Russian government utilizes several main tactics. One of the most effective is the maintenance of a state monopoly on all oil and gas pipelines within Russia. For example, in 2007, TNK-BP (to be fully introduced later) ran into trouble with regard to Gazprom’s (the semi-private successor to the Ministry of the Natural Gas Industry) control over gas pipelines. In the normal course of extracting petroleum, TNK-BP also encountered natural gas deposits, which it could have sold and transported via the Gazprom network. However, the natural gas giant did not allow TNK-BP access to the gas pipeline, with the result that TNK-BP could not produce enough gas to fulfill a nine billion cubic meter expectation for the year.<sup>49</sup> Goldman describes Putin’s displeasure at the unrealized gas extraction, and adds that “[t]he Russian owners of TNK[-BP] were reported to believe that this was all a pressure tactic to force them to sell their share of the partnership at a cheaper price to Gazprom.”<sup>50</sup> This example demonstrates how the pipeline monopoly squeezes private energy companies, because in

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44. *Id.* at 213 (quoting Ivanov).

45. *Id.* (not quoting Ivanov).

46. *Id.* at 218.

47. *Id.* at 220 (“If private interest were building the pipelines, market-based economic calculations would be paramount, not geostrategy.”).

48. See GOLDMAN, *supra* note 1, at 57 (“[I]n 2000, even after nearly a decade of private ownership, only 3 million Russians out of the 70 million who were supposed to pay taxes actually did so.”).

49. *Id.* at 131.

50. *Id.*

addition to pressure to live up to state production expectations in the face of uncooperative players like Gazprom, the private firms must contend with a slew of environmental regulations that carry heavy fiscal penalties, if violated.<sup>51</sup>

Other methods of asserting government control include discriminatory regulation that favors companies with majority Russian ownership,<sup>52</sup> and the placing of loyal and likeminded people in key energy posts.<sup>53</sup> The most dramatic exercise of state power in furtherance of the new Putin policy is expropriation of the assets of private oil companies. While the claim that the Russian state has and will continue to engage in confiscatory practices has engendered controversy, the literature on the Yukos affair lends support to the idea that the Russian government does contemplate expropriation in order to meet objectives. According to Balzer: “[I]f another major challenge [after Yukos] to state control of the ‘commanding heights’ of Russia’s energy sector were to materialize, the government would not hesitate to intervene decisively”;<sup>54</sup> “[a]ll [oil companies] are subject to the threat of sharing Yukos’s fate.”<sup>55</sup> In this excerpt, Balzer uses the word “intervene,” in reference to confiscatory action. Goldman agrees: “The attacks on Yukos and Mikhail Khodorkovsky highlight Putin’s determined effort to reign in these upstart oligarchs and at the same time renationalize and refashion their property into state companies and his vaunted national champions.”<sup>56</sup> Despite the controversy over whether Russia really can or has expropriated private property, little evidence contradicts the fact that adequate checks on Russia’s executive branch do not exist.<sup>57</sup> Consequently, if the Putin administration did decide to implement its policy via expropriation, very little would stand in its way.

### *Background on Yukos*

With the attack on Yukos, the Russian state established a precedent and procedure for how to expropriate a private energy company. Yukos was one of the largest private oil companies in Russia prior to its dismantling.<sup>58</sup> Mikhail Khodorkovsky was its CEO, with an estimated

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51. *Id.*

52. *See id.* at 127 (describing a law barring companies with less than 51% Russian ownership from conducting new exploration).

53. *See id.* at 139 (describing how Putin “purge[d] the self-dealers and asset-strippers from Gazprom.”); *id.* at 104 (describing how Putin replaced senior Gazprom executives with Putin’s associates, including Dmitry Medvedev, Russia’s current president).

54. Balzer, *supra* note 9, at 211.

55. *Id.* at 221.

56. GOLDMAN, *supra* note 1, at 105.

57. Balzer, *supra* note 9, at 223.

58. Winkler, *supra* note 6, at 116; *see also* Plaintiff’s Verified Emergency Motion for

wealth of \$15 billion dollars prior to his arrest.<sup>59</sup> After Khodorkovsky's arrest, the Russian tax authorities leveled a barrage of back-tax claims against Yukos, some of which exceeded Yukos' total revenue for given years.<sup>60</sup> Russian courts confirmed the tax authority's claims, though the tax assessment's accuracy was challenged on various occasions to no avail: "Whenever someone came up with a calculation that showed that the company's assets were actually more valuable than indicated in earlier estimates, the tax authorities would recalculate the overdue tax debt and somehow come out with an even larger estimate."<sup>61</sup> In order to cover the debts owed to it, the Russian government put up for auction Yukos' most valuable production asset, Yuganskneftegaz.<sup>62</sup> The auction was scheduled for December 19, 2004, and Gazprom was expected to participate with funding from leading international banks, including Deutsche Bank.<sup>63</sup>

Days before the commencement of the auction, Yukos initiated a bankruptcy proceeding in Houston, Texas and received a temporary restraining order against the Russian government and all third-party financiers of the bidders.<sup>64</sup> The auction went ahead as planned, although without the participation of Gazprom or the international banks.<sup>65</sup> The winner, Baikalfinansgroup, was quickly merged with the state-owned Rosneft oil company.<sup>66</sup>

Yukos tried to defend itself through the Houston bankruptcy proceeding, filing its application for protection from creditors under Chapter 11 of the U.S. Bankruptcy Code.<sup>67</sup> Though Yukos had almost no ties with Texas, the Houston bankruptcy court found jurisdiction under 11 U.S.C. § 109(a)<sup>68</sup> based on the fact that Yukos' financial director had been living in Texas since Khodorkovsky's arrest, Yukos had created a subsidiary in Houston the same day it filed for protection, and Yukos had two recently-opened bank accounts in Houston.<sup>69</sup> Despite the fact that the Houston court found jurisdiction, the court dismissed Yukos' application

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Temporary Restraining Order and Preliminary Injunction ¶ 11 at 5, *In re Yukos Oil Co.*, Nos. 04-47742-H3-11, 04-03952 (Bankr. S.D. Tex. 2005) ("Yukos and its subsidiaries are the largest producers of crude oil in Russia, and the largest exporters of crude oil from Russia.").

59. GOLDMAN, *supra* note 1, at 105.

60. *Id.* at 120.

61. *Id.* at 121.

62. Giuditta Cordero Moss, *Between Private and Public International Law: Exorbitant Jurisdiction as Illustrated by the Yukos Case*, 32 REV. CENT. E. EUR. L. 1, 2 (2007).

63. *Id.*

64. *Id.* at 2-3.

65. Winkler, *supra* note 6, at 120; GOLDMAN, *supra* note 1, at 120.

66. Winkler, *supra* note 6, at 120 n.23.

67. Cordero Moss, *supra* note 62, at 2.

68. 11 U.S.C. § 109(a) (2000); Winkler, *supra* note 6, at 118.

69. Cordero Moss, *supra* note 62, at 3.

based on an appraisal of the totality of the circumstances.<sup>70</sup> Yukos' main problem in the Houston case, therefore, was not jurisdiction, but rather other factors, such as the fact that Yukos had sought relief in other fora, including Russia, and also that Yukos was such a large and politically important company for the Russian Federation.<sup>71</sup>

### *Background on TNK-BP*

TNK-BP appears to be at risk of suffering expropriation at the hands of the Russian government. In contrast to Yukos, TNK-BP did not begin as a primarily Russian company, but rather was formed by a merger between BP's energy holdings in Russia and the Tyumen Oil Company (TNK).<sup>72</sup> BP owns 50 percent of TNK-BP, and the Alpha-Access-Renova group (AAR) owns the other half.<sup>73</sup> Again, in contrast to Yukos, BP has a clear foreign presence, not only in the equity ownership structure of the company, but also in the management, which until recently consisted of BP executives.<sup>74</sup> Apparently, Putin was displeased by the fact that TNK-BP was not majority Russian-owned.<sup>75</sup>

Given the Putin administration's ideological stance, TNK-BP is doubly vulnerable because of its size and because of its large foreign equity ownership, both of which pose a threat to the Russian state's grand strategy. In fact, TNK-BP has already experienced problems with the Russian environmental authorities, as well as with Gazprom's monopoly control over Russia's gas pipelines.<sup>76</sup> Should the Russian government seek more aggressively to assert control over TNK-BP, no real barrier would stand in the way of confiscatory action. Consequently, TNK-BP and other private companies operating in the Russian energy sector must consider viable litigation options as one possible line of defense against expropriation.

TNK-BP would be unlikely to prevail in a Russian court. As Philip Hanson notes: "The Russian state can use a procuracy and courts that will do the state's will, regardless of the letter and spirit of the law."<sup>77</sup> This dependency of the courts on the executive branch would only be more complete in a case involving the energy sector, especially with a foreign plaintiff. As a result, TNK-BP must escape the Russian court system by

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70. *In re Yukos*, 321 B.R. at 411.

71. *Id.* at 410-11.

72. GOLDMAN, *supra* note 1, at 86.

73. *Id.*

74. *Id.* at 126.

75. *Id.*

76. *Id.* at 131.

77. See Hanson, *supra* note 15, at 484 (describing how members of the Russian court are effectively puppets of the political bosses).

establishing jurisdiction in a foreign country or in an international tribunal. Fortunately, the United States offers an opportunity to establish jurisdiction directly against the Russian Federation under the Foreign Sovereign Immunities Act (FSIA), which may prove effective at defending TNK-BP's assets from expropriation by the Russian government.

### III. DEFENSIVE METHODS FOR TNK-BP

#### A. *The U.S. Foreign Sovereign Immunities Act*

The first method for consideration, and TNK-BP's better alternative, is to bring suit in the United States under a recognized cause of action, such as the taking of aliens' property by a foreign government in violation of international law. The Foreign Sovereign Immunities Act (FSIA) grants blanket immunity to the acts of foreign sovereigns. Certain exceptions exist to this general grant of immunity under the FSIA, and it is through these exceptions, and only these, that jurisdiction over a foreign sovereign can be had in a U.S. court.<sup>78</sup> One of the exceptions stipulated in the FSIA is for the taking of private property by a foreign sovereign in violation of international law.<sup>79</sup> The relevant piece of the FSIA is set forth as follows:

A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .<sup>80</sup>

As interpreted by the court in *Altmann v. Republic of Austria*, to establish that the expropriation exception applies to its (hypothetical) confiscation claim, TNK-BP would have to demonstrate three items: (1)

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78. *Altmann v. Republic of Austria*, 317 F.3d 954, 962 (9th Cir. 2002); *Altmann v. Republic of Austria*, 142 F.Supp. 2d 1187, 1198 (C.D. Ca. 2001). The *Altmann* case involved a suit brought by a U.S. citizen against Austria for the recovery of paintings allegedly expropriated by an instrumentality of the Austrian government during World War II. Giuditta Cordero Moss mentions the *Altmann* case very briefly at the conclusion of *Between Private and Public International Law: Exorbitant Jurisdiction as Illustrated by the Yukos Case*, hinting that Yukos may attempt to bring a claim under the Foreign Sovereign Immunities Act. See Cordero Moss, *supra* note 62, at 16-17.

79. *Altmann*, 142 F. Supp. 2d at 1202.

80. 28 U.S.C. § 1605(a)(3) (2000); *Altmann*, 142 F. Supp. 2d at 1202.

that the property was taken in violation of international law; (2) that the taken property is “owned or operated” by the defendant foreign state; and, viewing the two clauses (separated by the semicolon) of 28 U.S.C. § 1605(a)(3) cited above as disjunctive,<sup>81</sup> (3) that the foreign state “is engaged in commercial activity in the United States.” For a taking to be legitimate under international law, a) the taking must be for a public purpose; b) the alien owner must not have been discriminated against; and c) “payment of just compensation must be made.”<sup>82</sup> The *Altmann* court describes “commercial activity” as follows: “[W]hen a foreign government acts . . . in a manner of a private player within [the market], the foreign sovereign’s acts are ‘commercial’ within the meaning of the FSIA.”<sup>83</sup>

Establishing the Application of the FSIA Expropriation Exception:  
Yukos’ Argument

*1. Violation of International Law*

Yukos could have potentially established all three of the expropriation exception elements set forth by the FSIA. First, we consider the “in violation of international law” element. As to the “public purpose” requirement, the Russian government may justify the confiscation of Yuganskneftegaz as a taking for the public purpose of revitalizing Russia and achieving greater social welfare. Given the Putin administration’s energy ideology, this argument may prove persuasive, unless some evidence of corruption and self-dealing surfaced.

Second, we examine the nondiscrimination requirement. To begin, Yukos can make a strong argument that the Russian state took the property of foreign citizens in the auction of Yuganskneftegaz. For one, American investors owned shares of Yukos, the price of which reflect the value of Yukos’ most productive asset, Yuganskneftegaz. Indeed, Yukos emphasizes the fact that American investors owned 17 percent of Yukos common stock at various times, and that the auction damaged the value of that stock.<sup>84</sup> Thus, the auction of Yuganskneftegaz effectively “took” away most of the value of Yukos’ common stock. This equity value constitutes the taken property. It is important that foreigners owned some of the

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81. *Altmann*, 142 F. Supp. 2d at 1202.

82. *Id.*

83. *Id.* at 1204 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)).

84. Plaintiff’s Verified Emergency Motion for Temporary Restraining Order and Preliminary Injunction ¶¶ 17-18 at 7, *In re Yukos Oil Co.*, Nos. 04-47742-H3-11, 04-03952 (Bankr. S.D. Tex. 2005).

Yukos property because a confiscation does not violate international law unless there is a taking of *alien* property.<sup>85</sup> In *F. Palicio y Compania, S.A. v. Brush*, which involved the alleged expropriation of Cuban citizens' property by the Castro government, the court held that no violation of international law had occurred because all of the parties were Cuban residents or citizens at the time of the alleged taking. In the end, Yukos could have put forward the argument that the confiscation of Yuganskneftegaz constituted a taking of foreign property, which is required for a violation of international law.

However, the question remains whether the Russian government *discriminated* against the foreign owners of Yukos stock. The auction of Yuganskneftegaz and its subsequent acquisition by Rosneft amounts to an expropriation of both foreign and Russian citizens' property. Viewed from this perspective, the taking of Yuganskneftegaz did not, in itself, discriminate against aliens. Consequently, the Russian government has a strong argument that it did not violate the nondiscrimination requirement of a legitimate taking.

Nevertheless, with regard to the third requirement, "just compensation," Yukos has the better argument. Baikalfinansgroup's winning bid in the Yuganskneftegaz auction "was less than half of what such an auction should have yielded."<sup>86</sup> The compensation that Yukos received for Yuganskneftegaz, particularly in light of the rigged "Loans for Shares" auctions of the 1990s,<sup>87</sup> can hardly be characterized as fair.

Consequently, while the Russian government arguably met the "public purpose" and nondiscrimination requirements of a legitimate taking of alien property under international law, the state failed to provide Yukos with "just compensation" for Yuganskneftegaz. As a result, the auction of Yuganskneftegaz and its subsequent acquisition by Rosneft constituted a taking in violation of international law, thereby satisfying the first element of the FSIA expropriation exception.

## 2. "Owned or Operated" by the Foreign State

As for the second element of the FSIA expropriation exception, that the taken property must be "owned or operated" by the foreign government, Yukos would likely establish this element to the satisfaction of the court. After all, following the Yuganskneftegaz auction, the state-owned oil company Rosneft retained the formerly Yukos-owned property.

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85. *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966).

86. GOLDMAN, *supra* note 1, at 120.

87. *See id.* at 63-65 (describing the notorious, self-dealing "Loans for Shares" program).

### 3. “Engaged in Commercial Activity in the United States”

Yukos’ greatest hurdle would be demonstrating that the Russian government engaged in “commercial activity”—in accordance with the FSIA meaning—within the United States. First, the *Altmann* court held that the requirement of a *connection* between the taken property and the defendant government’s commercial activity in the United States that appears *prior to* the semicolon in 28 U.S.C. § 1605(a)(3) does not carry over into the clause *following* the semicolon.<sup>88</sup> Therefore, the plaintiff need not show that the foreign state’s commercial activity in the United States bears a relation to the expropriated property, or, in other words, the expropriation need not arise out of the commercial activity. This makes Yukos’ argument easier to make. Yukos would be hard pressed to find a clear link between Russian Federation commercial activity in the United States and the auction and state acquisition of Yuganskneftegaz. In light of the *Altmann* court’s reading of the statute, however, Yukos only needs to show that the Russian government engaged in commercial activity—in some way—in the United States.

Moreover, the *Altmann* court adopted a broad interpretation of “commercial activity.” The court cited *Siderman de Blake v. Republic of Argentina*, a case involving the expropriation of a hotel in a foreign country. The expropriated hotel solicited and entertained Americans, and accepted “payment from credit cards and traveler’s checks of those guests,” which was held to be “sufficient commercial activity to confer jurisdiction under the FSIA.”<sup>89</sup> Given the reasoning in *Altmann*, Yukos could argue that the sale of Yuganskneftegaz to the state (Rosneft) constituted a transaction that may have involved stock owned by U.S. residents or citizens. Also, the auction had clear effects in the United States on U.S. residents who owned stock in Yukos. Indeed, the value of Yukos stock fell precipitously.<sup>90</sup> Consequently, the auction of Yuganskneftegaz established commercial links between the Russian government and the United States. Yukos did, in fact, make the “effects doctrine” argument in its motion for a temporary restraining order in the Houston proceeding.<sup>91</sup>

Overall, Yukos has a strong argument that the Russian government’s acquisition of Yuganskneftegaz amounts to an expropriation of alien property under the FSIA, and strips the Russian state of immunity from the

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88. *Altmann*, 142 F. Supp. 2d at 1202.

89. *Altmann*, 142 F. Supp. 2d at 1205 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 712 (9th Cir. 1992)).

90. Plaintiff’s Verified Emergency Motion for Temporary Restraining Order and Preliminary Injunction ¶ 18 at 7, *In re Yukos Oil Co.*, Nos. 04-47742-H3-11, 04-03952 (Bankr. S.D. Tex. 2005).

91. *Id.* ¶¶ 17-18 at 7.



jurisdiction of U.S. courts.

### TNK-BP's Argument

#### *1. Violation of International Law*

TNK-BP has an even stronger argument than Yukos vis-à-vis the FSIA expropriation exception. To begin, BP, a foreign company, owns 50 percent of TNK-BP. Therefore, no question arises—under *F. Palicio y Compania*—as to whether a confiscation of TNK-BP's assets would affect aliens, and consequently, implicate international law. Now we turn to the three requirements of a legitimate taking. With regard to the first requirement, that the taking serve a “public purpose,” the Russian government can again argue that according to the state's energy ideology, state ownership of TNK-BP's assets will further the interests of the country as a whole. As in the case of Yukos, such an argument may be persuasive, unless self-dealing played a role in the taking.

Looking to the nondiscrimination requirement, the Russian government again makes a strong case: confiscation of TNK-BP property would affect Russian and foreign investors equally, especially because of the fifty-fifty equity ownership structure. Therefore, despite the fact that a taking of TNK-BP would negatively affect aliens, the acquisition would not be discriminatory.

However, as with Yukos, TNK-BP would likely prevail on the “just compensation requirement,” as TNK-BP stands little chance of receiving a fair market price for its assets in any government-run auction. As a result, TNK-BP could make a showing that the Russian government failed to meet the “just compensation” requirement, and thus took alien property in violation of international law. In this way, TNK-BP would establish the first element of FSIA expropriation exception.

#### *2. “Owned or Operated” by the Foreign State*

As in Yukos' case, TNK-BP could likely demonstrate that the Russian state owned or at least operated TNK-BP's confiscated property, as the taken assets would move from TNK-BP to a front company—which would have won a government-directed auction—and, at last, to a state instrumentality such as Rosneft.<sup>92</sup> Thus, TNK-BP could establish the second element of the FSIA expropriation exception.

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92. See GOLDMAN, *supra* note 1, at 121-22 (describing other front companies, such as the entities “Prana” and “RN-Razvitiye,” that the author argues bid on behalf of Rosneft in subsequent auctions of Yukos property).

### 3. “Engaged in Commercial Activity in the United States”

As for Yukos, TNK-BP’s greatest challenge would consist in demonstrating that the Russian Federation engaged in “commercial activity” within the United States. Yet, as the *Altmann* court emphasized, 28 U.S.C. § 1605(a)(3) does not require that the commercial activity have a connection with the aliens’ taken property.<sup>93</sup> As a consequence, any commercial activity—broadly construed as in *Siderman de Blake* and *Altmann*—conducted by the Russian government in the United States will satisfy the third FSIA element. Thus, any advertising aimed at the American public or even the sale of Rosneft oil to the United States<sup>94</sup> may qualify as “commercial activity” under the FSIA expropriation exception.

In all, TNK-BP, like Yukos, would have a strong argument for the application of the FSIA expropriation exception, and consequently, the exercise of jurisdiction by American courts over the Russian government.

#### Personal Jurisdiction Over the Russian Federation and Venue

Even if Yukos and TNK-BP establish that the FSIA’s expropriation exception applies, the Russian state can challenge the lawsuit on personal jurisdiction grounds. Personal jurisdiction over the Russian Federation did not play a role in Yukos’ Houston action, because in a Chapter 11 bankruptcy proceeding, the relevant jurisdictional question is whether the court can exercise jurisdiction over the debtor.<sup>95</sup> However, in a non-bankruptcy suit brought under the FSIA, jurisdiction over the Russian state may arise. Nevertheless, Yukos and TNK-BP would have strong arguments in support of the exercise of jurisdiction. In *Altmann*, Austria raised a personal jurisdiction challenge, but the court reasoned that—in

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93. *Altmann*, 142 F. Supp. 2d at 1202.

94. See GOLDMAN, *supra* note 1, at 3-4, 7 (noting that the United States imported \$10 billion of Russian petroleum in 2006, that Gazprom has begun to export liquefied natural gas to America, and that Gazprom hopes to supply ten percent of the United States’ natural gas by 2010); Winkler, *supra* note 6, at 120 n.23 (noting that Gazpromneft was supposed to merge with Rosneft prior to the issuance of the Houston bankruptcy court’s restraining order regarding the Yuganskneftegaz auction). This abortive merger plan suggests the possibility that Gazprom and Rosneft may contemplate a merger in the future. A successful merger between the two energy giants would likely mean that the Russian state would largely own Gazprom, which would arguably make Gazprom an instrumentality of the state, as Rosneft now is. As a result, increasing exports of Russian petroleum and natural gas to the United States may strengthen future claims brought under the FSIA’s expropriation exception.

95. See *In re Yukos*, 321 B.R. at 405-07 (affirming that congress meant for the “broad grant of jurisdiction” to U.S. bankruptcy courts to “extend[] to extraterritorial application of the Bankruptcy Code as it applies to property of the bankruptcy estate”); see also, Winkler, *supra* note 6, at 118-19 (asserting that the Houston bankruptcy court could exercise jurisdiction over the debtor’s property “wherever located” (footnote omitted)).

accordance with the act's legislative history—FSIA itself establishes jurisdiction over the defendant sovereign once the plaintiff demonstrates that a FSIA exception applies.<sup>96</sup> Moreover, the *Altmann* court held that a “foreign state is not a ‘person’ under the Due Process Clause of the United States Constitution,” thereby rejecting the idea that the court must engage in a “minimum contacts” analysis to determine the appropriateness of jurisdiction over Austria.<sup>97</sup>

As a result, Yukos and TNK-BP can defend against a motion to dismiss for lack of personal jurisdiction by pointing to the FSIA itself as a liberal grant of personal jurisdiction to the court over the Russian Federation. Moreover, Yukos and TNK-BP can assert that the Russian state cannot claim Due Process Clause protection because the Russian government is not a person and thus has no “personal liberty interest”<sup>98</sup>—which the Due Process Clause is meant to protect—at stake.

As for venue, the Russian government probably cannot raise a successful challenge on this point. The FSIA includes a provision for venue, which allows for the bringing of suit against the foreign state “in any judicial district in which the agency or instrumentality [of the foreign state] . . . is doing business . . . or . . . in the United States District for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.”<sup>99</sup> Consequently, Yukos and TNK-BP can likely establish venue in any city that imports petroleum or natural gas from an instrumentality of the Russian state, such as Rosneft, or any other place with which the Russian government has a commercial connection.

#### Totality of the Circumstances

In the end, the Houston court dismissed Yukos' application for bankruptcy protection based on the “totality of the circumstances” in the case.<sup>100</sup> Unlike challenges on jurisdictional or venue grounds, which the defendant raises, a court can *sua sponte* commence a totality of the circumstances analysis. A totality of the circumstances challenge presents a difficult strategic problem for the plaintiff because of the amorphous, open-ended nature of the court's reasoning. For example, in the Yukos bankruptcy, the court considered a number of factors, including the fact that Yukos had commenced litigation in other non-U.S. fora; that the applicable substantive law required translation, a process that could itself prove contentious; and Yukos' “sheer size” and “impact on the entirety of

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96. *Altmann*, 142 F. Supp. 2d at 1206-07.

97. *Id.* at 1208.

98. *Id.*

99. *Id.* at 1214 (quoting 28 U.S.C. § 1391(f)(1)-(4) (2000)).

100. *In re Yukos*, 321 B.R. at 411.

the Russian economy . . . .”<sup>101</sup>

Nevertheless, TNK-BP has the benefit of a much more favorable factual background than Yukos. While Yukos’ shareholding structure included only a minority of foreign investors,<sup>102</sup> a foreign company—BP—owns a full fifty percent of TNK-BP’s stock. TNK-BP’s diverse ownership structure undermines the notion that Russian courts provide a natural forum for a dispute over alleged expropriation by the Russian state. Indeed, despite the fact that TNK-BP’s assets sit primarily on Russian territory, the company’s activities, and troubles, affect investors in various parts of the world.

Moreover, BP owns significant assets and has thousands of employees in the United States.<sup>103</sup> BP maintains far more substantial contacts with the United States than Yukos.<sup>104</sup> These facts favor litigation in the United States and undercut the notion that, in the totality of circumstances, Russia emerges as the clearly appropriate forum. While BP’s presence in Russia through TNK-BP has direct effects on the Russian economy, the expropriation of TNK-BP’s assets would affect BP’s operations worldwide, including in the United States.

Finally, the fact that Yukos initiated litigation in non-U.S. fora prior to bringing its bankruptcy action in Houston, weighed against the continuation of proceedings in the United States.<sup>105</sup> Should TNK-BP fall victim to expropriation by the Russian state, the company should refrain from commencing litigation in Russia or other non-U.S. fora. Yukos’ choice on non-U.S. fora suggests that Yukos considered these other fora to be both legitimate and fair. Yukos’ implicit concession to the legitimacy of these non-U.S. fora simplified the Houston court’s decision to dismiss. By contrast, if TNK-BP moves to litigate in the United States first, it would create a more favorable set of circumstances for itself by signaling its lack of faith in the fairness of alternative non-U.S. fora.

The court has wide discretion when conducting a totality of the circumstances analysis. Nevertheless, TNK-BP benefits from more favorable facts than Yukos, and given the closeness of the Houston court’s decision, a few more favorable circumstances could tip the balance in

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101. *Id.*

102. Plaintiff’s Verified Emergency Motion for Temporary Restraining Order and Preliminary Injunction ¶ 12 at 5-6, *In re Yukos Oil Co.*, Nos. 04-47742-H3-11, 04-03952 (Bankr. S.D. Tex. 2005).

103. BP Global—BP in the United States, <http://www.bp.com/sectiongenericarticle.do?categoryId=488&contentId=2000734> (last visited April 4, 2009).

104. Plaintiff’s Verified Emergency Motion for Temporary Restraining Order and Preliminary Injunction ¶ 13-16 at 4-5, *In re Yukos Oil Co.*, Nos. 04-47742-H3-11, 04-03952 (Bankr. S.D. Tex. 2005).

105. *In re Yukos*, 321 B.R. at 411.

TNK-BP's favor.

Overall, bringing an action in the United States under the Foreign Sovereign Immunities Act (FSIA) would provide Yukos, and especially TNK-BP, with a solid chance for gaining access to a U.S. court and maintaining the litigation in the United States. The FSIA offers the plaintiff three major advantages. First, it is only through the FSIA that the plaintiff can establish jurisdiction over a foreign sovereign, such as the Russian state. Second, the FSIA streamlines questions of personal jurisdiction over the foreign sovereign, thereby neutralizing a major threat to the maintenance of the suit in the United States. Finally, the FSIA virtually guarantees venue in the United States through its venue provision.

*B. International Arbitration in an ICSID Court*

Another litigation option for Yukos and TNK-BP is international arbitration under the rules of the International Centre for the Settlement of Investment Disputes (ICSID). In his article *Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court*, Matteo M. Winkler argues that Yukos could have access to an ICSID court because Russia has implicitly consented to ICSID jurisdiction via its provisional adoption of the Energy Charter Treaty (ECT).<sup>106</sup> As originally conceived, ICSID jurisdiction could be established only through the written consent of the parties.<sup>107</sup> In the absence of such a formal written agreement between the investor and the state, "the traditional doctrine confirms that the investor has no other choice than to file claims before a national court."<sup>108</sup> Thus, in keeping with the traditional approach, Yukos could not hope to establish ICSID jurisdiction over the Russian Federation, as no formal arbitration agreement exists between the two parties.

However, Winkler argues, ICSID case law has effectuated a shift towards a more permissive doctrine: "In those [ICSID] decisions, the lack of jurisdiction, which is the absence of the state's consent, has been overcome by recognizing the consent of the state in the national laws or in international treaties to submit disputes to ICSID jurisdiction when dealing with foreign investment arbitrators."<sup>109</sup> For example, in the *Pyramids* case, a Hong Kong company sought ICSID jurisdiction against the Egyptian government, despite the absence of a formal arbitration agreement between

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106. See Winkler, *supra* note 6, at 126-47 (explaining how ICSID jurisdiction is possible even in the absence of a specific arbitration agreement between the foreign investor and the host government, and applying this notion to the *Yukos* case).

107. *Id.* at 127.

108. *Id.*

109. *Id.* at 128.

the parties giving consent to ICSID jurisdiction.<sup>110</sup> The ICSID court found jurisdiction based on the fact that Egypt had passed a law that “generally provided that all the investment disputes related to foreign investments would have been settled according to the ICSID convention and other international treaties applicable to Egypt.”<sup>111</sup> A later case, *Tradex Hellas v. Albania* upheld the *Pyramids* court’s ruling, and reinforced the newly emerging doctrine “that internal laws can constitute an expression of consent according to article 25 of the [ICSID] Convention.”<sup>112</sup>

The bottom line, according to Winkler, consists in the following: “Fundamentally, the recognition of ICSID jurisdiction through national legislation can be interpreted as a unilateral ‘offer’ to conclude an arbitration agreement directed from the state to the foreign investor who, in order to set up the arbitration proceedings, will be surely able to accept.”<sup>113</sup> Thus, even in the absence of a formal arbitration agreement, the state can still, in general, consent to ICSID jurisdiction through the passing of legislation. An offer to litigate in an ICSID court can be accepted by a foreign investor by simply initiating an ICSID proceeding.

Turning to Russia, we find that the Russian government has signed and must provisionally apply the Energy Charter Treaty (ECT)—“the major international instrument regarding the sector of energy sources.”<sup>114</sup> The ECT forbids the nationalization of foreign investments or “measures having effect equivalent to nationalization or expropriation.”<sup>115</sup> Also, the ECT provides that the foreign investor has a choice of either bringing claims in the host country’s national courts, or initiating international arbitration, including arbitration in a tribunal following the ICSID rules.<sup>116</sup> Consequently, Winkler concludes that because Russia provisionally applies the ECT, it also consents to ICSID jurisdiction in cases involving the alleged expropriation of a foreign investor’s property by the Russian government.<sup>117</sup> Moreover, when a party commences ICSID arbitration in the U.S., and in the absence of a formal arbitration agreement specifying venue, the arbitration, in accordance with section 206 of the Federal Arbitration Act of 1976, “will take place in the district where the filing occurred.”<sup>118</sup>

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110. *Id.* at 128-29. For more details on the *Pyramids* case, see *id.* at 128 n.51.

111. *Id.* at 129-30 (footnote omitted).

112. *Id.* at 131. For more details on the *Tradex Hellas* case, see *id.* at 130 n.57.

113. *Id.* at 131-32.

114. *Id.* at 137.

115. *Id.* at 138 (quoting ECT article 13.1); for the full citation of the ECT see *id.* at 132-33 n.61.

116. *Id.* at 139.

117. *Id.* at 141.

118. *Id.* at 151 (referencing section 206 of the U.S. Federal Arbitration Act of 1976, 9 U.S.C. § 206 (2000)).

Following this logic, TNK-BP, like Yukos, would have a strong argument for the establishment of ICSID jurisdiction over the Russian government. Foreign investors owned a sizable minority of Yukos' equity<sup>119</sup> and foreign investors make up half of TNK-BP's shareholding structure.<sup>120</sup> Given this fact and the discussion above<sup>121</sup> concerning the viability of Yukos' and TNK-BP's claims that the takings by the Russian state violate international law, both companies can lodge complaints against Russia under the ECT. Because of the greater foreign participation in TNK-BP, this company likely has a better claim under the ECT than does Yukos.

Unlike the argument presented above with regard to Yukos or TNK-BP bringing a claim under the FSIA—for which relevant precedents exist—the reasoning behind the initiation of ICSID arbitration by either company remains highly speculative. The ICSID courts do not appear to have dealt with a case basing ICSID jurisdiction on a state's provisional application of the ECT. Winkler himself concludes soberly: "At this point, one should remember nevertheless [sic] that it could be very difficult to compel arbitration against the Russian Federation before a U.S. court."<sup>122</sup>

Despite the uncertainty over whether an ICSID court would find jurisdiction over the Russian state under the ECT in the absence of a written arbitration agreement, TNK-BP should avoid the temptation of signing a formal agreement. It is unlikely that the Russian state would consent to venue in an arbitral tribunal sitting in the United States. However, if no agreement exists between TNK-BP and Russia concerning venue, TNK-BP could initiate arbitration in a U.S. ICSID court and, by the operation of section 206 of the U.S. Federal Arbitration Act of 1976, that court will become the venue for the arbitration. Arbitral proceedings in the United States would most likely prove more impartial in a case involving TNK-BP than Russian arbitral courts.

Of the two defensive methods presented in this section—bringing suit in the United States under the FSIA's expropriation exception and initiating ICSID arbitration—the first remains TNK-BP's better alternative. Several favorable precedents exist applying the FSIA to expropriations of aliens' property, including *Altmann v. Republic of Austria* and *Siderman de Blake v. Republic of Argentina*. Moreover, the FSIA's provisions make it much easier for the plaintiff to establish jurisdiction over the defendant sovereign.

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119. Plaintiff's Verified Emergency Motion for Temporary Restraining Order and Preliminary Injunction ¶ 12 at 5-6, *In re Yukos Oil Co.*, Nos. 04-47742-H3-11, 04-03952 (Bankr. S.D. Tex. 2005).

120. GOLDMAN, *supra* note 1, at 126.

121. See *supra* Part IIIA, The U.S. Foreign Sovereign Immunities Act, Violation of International Law.

122. Winkler, *supra* note 6, at 151.

The FSIA also streamlines venue, virtually guaranteeing a forum for the litigants. While the FSIA does require that the foreign state engage in commercial activity within the United States, the *Altmann* court's insistence on a disjunctive reading of 28 U.S.C. § 1605(a)(3) simplifies the plaintiff's task. Pursuant to *Altmann*'s holding, the plaintiff need only demonstrate that the defendant sovereign engages in some commercial activity in the United States, without also having to show a connection between that activity and the taken property. Overall, the provisions of the FSIA's expropriation exception favor TNK-BP's case.

On the other hand, pursuing ICSID arbitration, while a potentially attractive alternative, rests on far shakier ground. For one, Russia has not ratified the ICSID convention. Russia has adopted the ECT and applied it provisionally, and the ECT does provide for arbitration in an ICSID court. While Winkler's logic is compelling, in practice the links between Russia's provisional application of the ECT and consent to ICSID jurisdiction are attenuated. Furthermore, solid precedent on the connection between the ECT and ICSID jurisdiction does not seem to exist. Consequently, the safer, more predictable route is to litigate in the United States under the FSIA expropriation exception.

## CONCLUSION

The Putin administration has consciously and specifically exerted greater state control over Russia's energy sector. The change stands in stark contrast to the free-wheeling laissez-faire attitude characteristic of the Yeltsin years. Putin's notions rest on ideological and practical considerations and center around the dual project of reclaiming Russia's superpower status and raising Russians' standard of life. Through the dismemberment of Yukos, the Russian government has demonstrated its willingness to expropriate the assets of private energy companies in order to further Russian grand strategy. Other private oil companies operating in Russia, such as TNK-BP, have felt the state's coercive pressure and remain prime targets for expropriation, should such a move dovetail with Kremlin political strategy.

Despite threats from the state, TNK-BP and Yukos do have legal alternatives: bringing suit in the United States under the expropriation exception of the Foreign Sovereign Immunities Act (FSIA) and initiating ICSID arbitration. The literature and case law suggest that of these two litigation options, bringing suit under the FSIA is the surer approach. The FSIA's provisions streamline the often problematic questions of jurisdiction over the foreign state and venue, and ease the plaintiff's task in showing commercial activity of the defendant sovereign in the United States. Moreover, favorable precedents would buttress TNK-BP's and



Yukos' claims and add predictability to the proceedings.

In the end, the main legal strategy for TNK-BP and other private energy firms in Russia must consist in escaping the Russian court system. Particularly in cases involving the energy sector, the dominance of the executive branch over the courts effectively bars private petroleum and natural gas firms' access to justice. Fortunately, legal mechanisms exist for getting these companies' claims into U.S. courts or international tribunals.

This comment leaves the question of choice of law for another academic investigation. Most likely, Russian law will apply in many instances. However, the application of Russian law by impartial and independent non-Russian courts remains a more preferable route for private energy companies than litigating their claims in Russian domestic courts. Until Russian courts can create meaningful distance between themselves and the Kremlin in cases involving the energy sector, potential victims of expropriation, such as TNK-BP, will have to look beyond Russia's borders for their day in court.